St Vincent de Paul Society
NATIONAL COUNCIL
good works

ABN: 50 748 098 845

National Council of Australia Inc

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Mr Tim Watling
Inquiry Secretary
The Senate Standing Committee on Legal and Constitutional Affairs

Submission to the Standing Committee on Legal and Constitutional Affairs

The Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012

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Executive Summary

1. The National Council of the St Vincent de Paul Society ("the Society") welcomes the introduction of the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 ("the Bill"). However, we take this opportunity to make brief comment on the following matters.

2. The Society recommends that the list of examples in paragraph 20 of the Explanatory Memorandum accompanying the Bill naming particular groups of children who are "at risk or vulnerable" should be amended to include:

   (a) Children seeking asylum in Australia;

   (b) Refugee children;

   (c) Non-citizen children; and

   (d) Children in incarceration or detention.

3. The Society recommends that if after an examination by the Commissioner of any existing laws, the laws are found not to "recognise and protect the human rights of children", there should be a mechanism requiring Government action to be taken to remedy these laws, or at the very least, that the Minister issue a written response to those laws, under section 46MB(1)(d).

4. That Society recommends that section 46MB(6)(b) be amended to include that the Commissioner must have regard to the additional following instruments in executing his or her functions:

   (a) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;

   (b) *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*; and

   (c) *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*.

5. The Society notes, while it may be outside the scope of the Inquiry's work, it is important for Government to provide adequate funding for the National Children's Commissioner to conduct their work in an effective manner and to meaningfully fulfil the objectives of their role.

1. Introduction

1. The St Vincent de Paul Society is a respected charitable organisation operating in 142 countries around the world. In Australia we operate in every State and Territory with more than 50,000 members and volunteers committed to our work of social assistance and social justice. We are accountable to the people in our community who are marginalised by structures of exclusion and injustice.

2. On 24 May 2012, Mr Tim Watling, Inquiry Secretary on the Standing Committee on Legal and Constitutional Affairs Inquiry on the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 ("the Bill") invited written submissions from interested organisations.

3. The National Council of the St Vincent de Paul Society ("the Society") has previously made a submission on the Children and Young People Bill 2010. [1] In December of last year we endorsed "14 key principles" in the "*A National Commissioner for Australia*" [2] NGO Sector Position Paper, arising out of the NGO Roundtable hosted by the Australian Human Rights Commission ("AHRC") and the Australian Youth Affairs Coalition.

4. We now wish to make brief comment on the (2012) Bill.

2. The National Council of the St Vincent de Paul Society welcomes the introduction of the Bill

5. The Society welcomes the introduction of the Bill to establish the position of a National Children's Commissioner as an addition to the six commissioners already serving on the AHRC. We re-iterate our previous submission to the Inquiry that the creation of a statutory advocate for "the needs, rights and views of people below the age of eighteen" [3] is a significant step in highlighting the structural marginalisation of children in Australia, and recognition that children's rights are human rights. [4]

3. The Explanatory Memorandum

The mandate of the National Children's Commissioner

6. The Explanatory Memorandum to the Bill makes it clear that the Commissioner can "consider a range of matters relating to the rights, wellbeing and development of children",

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[1] Submission, *Submission to the Inquiry into the Commonwealth Commissioner for Children and Young People Bill* (December, 2010), <http://www.vinnies.org.au/files/NAT/SocialJustice/2010/Submission_to_the_Inquiry_into_the_Commonwealth_Commissioner_for_Children_and_Young_People_Bill.pdf>, page 3.

[2] Australian Youth Affairs Coalition, UNICEF and Save the Children Australia, *NGO Sector Position Paper: A National Commissioner for Australia's Children* (December, 2011), <http://www.ayac.org.au/uploads/A%20National%20Commissioner%20for%20Australia_s%20Children%20-%20paper.pdf>.

[3] See above, n 1.

[4] Dr John Falzon, *Rights for Kids at Christmas* (December, 2011), Eureka Street <http://www.eurekastreet.com.au/article.aspx?aeid=29465>.

and even cover the human rights of children as found in the articles of the United Nations *Convention on the Rights of the Child*. [5]

7. While the Government obviously intends that the mandate of the National Children's Commissioner be broad, the Explanatory Memorandum provides examples of particular groups of children who are at risk or vulnerable, including; "children with disability, Aboriginal and Torres Strait Islander children, homeless children or those who are witnessing or subjected to violence". [6] The Society recommends the addition of other groups of vulnerable and at risk children to this list, below.

Children seeking asylum in Australia, refugee children and non-citizen children

8. The Society recommends that in addition to the examples of groups of children listed at paragraph 20 of the Explanatory Memorandum, the following groups should be added to reflect "key principle 5 – Prioritising Vulnerable Groups" of the NGO Sector Position Paper:

    (a) Children seeking asylum in Australia;

    (b) Refugee children; and

    (c) Non-citizen children.

9. The addition of these three groups of children to paragraph 20 of the Explanatory Memorandum would explicitly acknowledge some of Australia's most "at risk or vulnerable" groups of children as being a possible area of "focus" for the Commissioner and recognises the marginalisation faced by these children in Australian society.

10. It is common knowledge that some refugee children have suffered multiple traumatic experiences including, war, persecution, deprivation and torture in their country of origin. As result of these experiences they are prone to mental health issues and physical ailments. [7] Our Kafkaesque federal immigration laws subject these same children to immigration detention, but with bitter irony also demand that parents of refugee children, when applying for temporary visas, sign an "Australian Values Statement" to abide by the Australian value of "compassion for those in need". [8] It is in the spirit of contradictions espoused by policy at the federal level that the Society seeks that these particular children be an enumerated focus group of the Commissioner.

11. Indeed, the addition of these children as a focus group would fall within the mandate of a federal children's commissioner, as many problems faced by the above groups arise out of Government policies and legislation at the federal level. For example, the *Migration Act 1958* (Cth) dictates the treatment of all three groups, and the Commissioner would be vested with the power to examine this Act to determine how it affects the rights, wellbeing and development of children and young people. [9]

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[5] Explanatory Memorandum to Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 ("Explanatory Memorandum"), para 12.
[6] Ibid, para 20.
[7] Nooria Mehraby, *Therapy with Refugee Children* (2005), <http://www.startts.org.au/ContentFiles/Startts/Documents/Therapy%20with%20Refugee%20Children.pdf>, pages 1-2.
[8] Department of Immigration, *Life in Australia* (October 2007), < http://www.immi.gov.au/living-in-australia/values/book/english/lia_english_full.pdf>, page 2.
[9] Explanatory Memorandum, page 1, bullet-point 2.

12. Furthermore, an acknowledgement of these groups as being at risk or vulnerable already falls within the large body of work previously conducted by the AHRC relating to children in immigration detention and asylum seeker and refugee children. [10]

Children in incarceration or detention

13. The Society also recommends that incarcerated children or children in detention should also be added to the examples in paragraph 20 of the Explanatory Memorandum.

14. It is well documented that children and youth in the criminal justice system suffer a broad range of psychosocial problems, come from some of the most disadvantaged groups within the community, and constitute approximately 25% of all people incarcerated. [11] Even worse, Indigenous youth are substantially overrepresented in the Australian criminal justice system – being 28 times more likely to be incarcerated than non-Indigenous youth. [12] The addition of incarcerated children or children in detention would also cover some refugee and asylum seeker children, as described above.

15. An acknowledgement of children in incarceration or in detention as groups at risk or vulnerable, would focus the work of the Commissioner in investigating, monitoring and promoting issues for this group of children, and complements work previously conducted by the AHRC in this respect.

4. The Bill

Section 46MB(1)(d) – recognising and protecting the human rights of children

16. It is submitted that, if after an examination by the Commissioner of any existing laws, the laws are found not to "recognise and protect the human rights of children", there should be a mechanism requiring Government action to be taken to remedy these laws, or at the very least, that the Minister issue a written response to those laws. The wording of the section requiring a response, for example, may be similar to section 33(3) of the *Human Rights Act 2004* (ACT) after a Minister receives a declaration of human rights incompatibility, which requires the Minister to respond. [13]

17. Any response might require the Minister to consider such issues as: how the human rights of a child might be affected (if at all) if they are not recognised and protected under the law, the consequences of not amending the law to recognise and protect the human rights of children, the extent to which the purpose of the law might be in conflict with the need to recognise and protect the human rights of the child, a determination about whether the law needs to be amended etc. The report might also require the Minister to consider the views of key stakeholders about existing or proposed law in preparing the report.

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[10] See examples of previous work conducted by the Australian Human Rights Commission here: <http://www.hreoc.gov.au/human_rights/immigration/index.html>.

[11] The Royal Australasian College of Physicians, *The Health and Well-being of Incarcerated Adolescents* (2011), < http://www.racp.edu.au/index.cfm?objectid=39396AC9-E30B-7941-0FD53740FF78DBC8>, page 13.

[12] House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time for Doing: Indigenous Youth in the Justice System* (June, 2011), <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report/fullreport.pdf>, page 8.

[13] Section 33(3), *Human Rights Act 2004* (ACT).

18. Ideally, laws found not to recognise and protect the human rights of children, presumably laws in some way affecting children or laws deemed by the Commissioner that need to recognise and protect the human rights of a child and not necessarily every law (as this is a positive requirement), would be amended to recognise and protect those human rights of children. At the very least, a response by the Minister would instil a level of public accountability and transparency by Governments seeking to enact legislation, or legislation already enacted by Governments, about why on recommendation of the Children's Commissioner, the Government does not (or does) wish to recognise and protect the human rights of children in law.

Section 46MB(6)(b) – should include additional international instruments

19. The Society endorses the position of the Human Rights Law Centre in their submission, [14] (and the reasons contained therein) that section 46MB(6)(b) should be amended so that the Commissioner ought to have regard to the following in performing their functions:

    (vi) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;

    (vii) *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*; and

    (viii) *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*.

5. Funding for the National Children's Commissioner

20. While it may be outside the scope of the Inquiry, we reiterate the concerns of the Honourable Catherine Branson QC, President of the AHRC, that the establishment of a role for the National Children's Commissioner must be adequately funded, not just to cover the Commissioner's and staff salaries, but to adequately assist with the expected rise in complaints under the *Convention on the Rights of the Child*. [15]

21. The Society notes that it is not enough that Government simply fund a paid position for a Commissioner, it must also ensure that the provision of funds allows the Commissioner to conduct their work in an effective manner (which includes dealing with the expected rise in complaints) and to meaningfully fulfil the enumerated objectives of their role. [16]

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[14] Philip Lynch, *Inquiry into Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012* (May, 2012), < https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bdfa728e-6dcd-4e18-b19d-b6d73f4b0206>, page 2.

[15] Australian Associated Press, *AG Announces National Children's Commissioner* (May, 2012) The Herald Sun, <http://www.heraldsun.com.au/news/breaking-news/ag-announces-national-childrens-commissioner/story-e6frf7jx-1226364504156>.

[16] Explanatory Memorandum, page 1.